No. 705.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

ROBERT DAVID KERCHEVAL, otherwise called "BOB" KERCHEVAL, otherwise called "DAVE" KERCHEVAL, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

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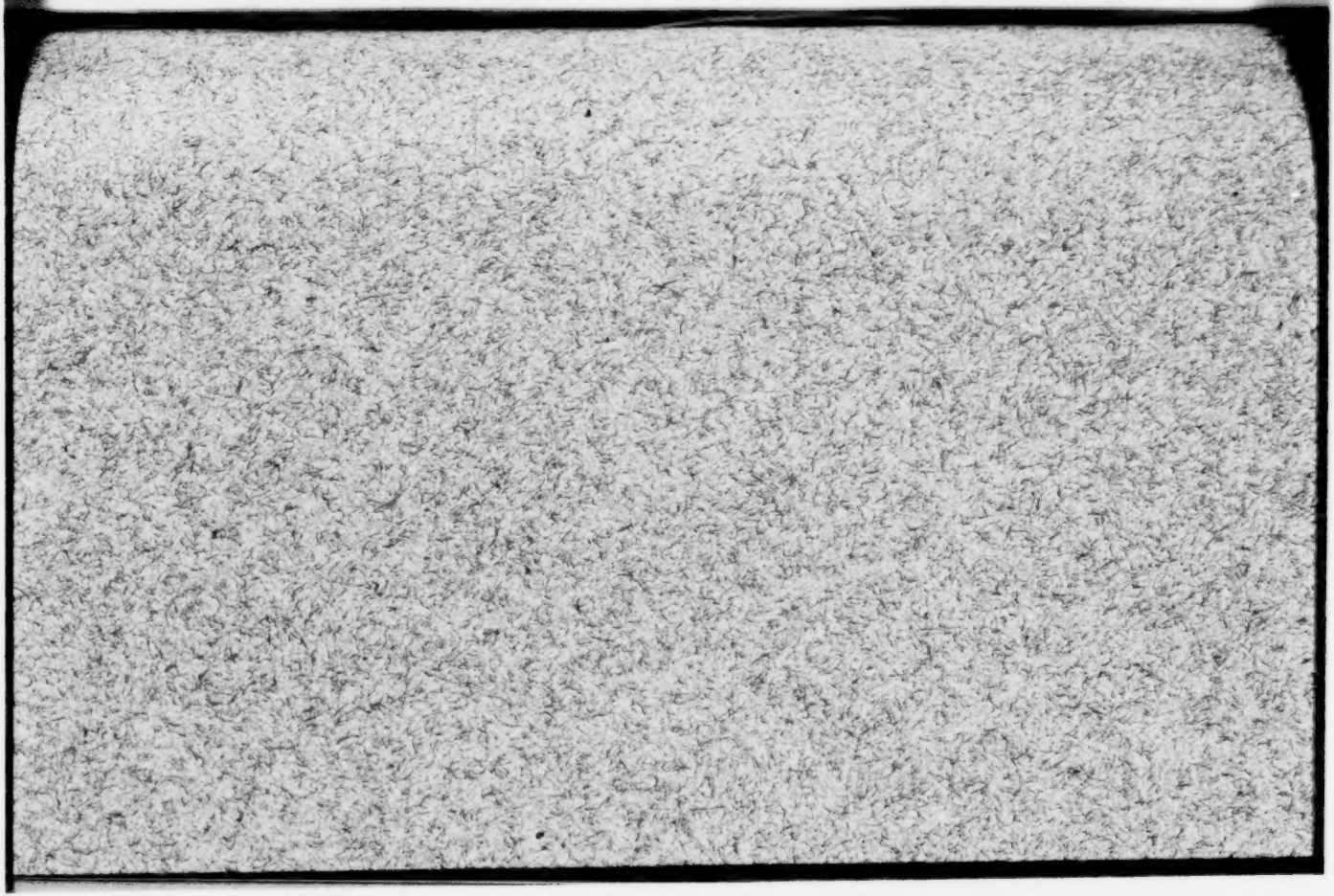

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Opinion of the Court Below.

The opinion of the Circuit Court of Appeals may be found at page 70 of the Record. It is reported in 12 F. (2nd) 904.

Jurisdiction of This Court.

The judgment of the Court below affirming the judgment of the District Court was rendered May 4, 1926 (R. 79) A petition for rehearing was filed and entertained, but denied on July 26, 1926. (R. 79). On October 26, 1926, petitioner applied to this Court for a Writ of Certiorari under Section 240-A, Judicial Code, as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 936, 938). The Writ was granted November 22, 1926.

Question Presented.

1. Where a defendant upon arraignment pleads guilty but later, with the permission of the Court, withdraws his plea of guilty and pleads not guilty, can the fact that he pleaded guilty be used as evidence against him?

In such a case, should not the trial court have declared a mistrial upon the opening statement by the prosecuting attorney that defendant had "once pleaded guilty"? In any event, was it not reversible error for the court to allow the prosecuting attorney to submit in evidence over objection of the defense a certified copy of the plea of guilty?

Statement.

Defendant was charged with using the mails to defraud in violation of Sec. 215 Federal Penal Code, in that he made various false representations in the selling of oil stock. It was alleged that he organized the Poindexter Royalty Syndicate and the Smackover Jack Pot Syndicate ostensibly for the purpose of dealing in oil royalties and leases, and, in general, engaging in the oil business, whereas, it was claimed in reality they

were merely stock selling propositions. Various representations, alluring in their character, and alleged by the Government to be false and fraudulent, are alleged to have been made by defendant in attempting to sell stock through the mails (R. 2-15).

When accused was arraigned he pleaded guilty, was convicted, and sentenced (R. 30, 34, 43-44). Later he filed a Motion to set aside the conviction and sentence on the ground that he was led to plead guilty by a promise of the prosecutor that he would be lightly punished. (R. 43) This Motion, after hearing, was granted by the Court with permission to accused to plead not guilty. Thereupon, he pleaded not guilty and was brought to trial (R. 34). The prosecuting attorney in his opening statement, over objection, informed the jury to this effect. He stated that defendant had already pleaded guilty to the offense charged (R. 29) though he was now going to trial upon a plea of not guilty. Later on, in closing the Government's case, the prosecuting attorney submitted in evidence a certified copy of defendant's plea of guilty, to which defendant again objected. (R. 31) The prosecuting attorney then proposed to introduce in evidence a certified copy of the judgment and sentence which had been entered upon the plea of guilty. Upon objection by defense and questioning by the Court as to the purpose for which the judgment and sentence was being introduced, the prosecuting attorney stated that his object was to show that the defendant did not attempt to withdraw his plea of guilty until after the judgment and sentence, and that the object of defendant's Motion was not really to withdraw his plea of guilty but to secure a reduction of the sentence. (R. 31) No matter what the object of the motion an examination of its contents shows that therein the defendant, by affidavit,

asserts his essential innocence of the offense charged. (R. 48-50)

As already seen, not only did the government prove his plea of guilty, but wished to prove, and so far as the jury was concerned, might as well have proved, that defendant was actually convicted of the very offense for which he was on trial; not only convicted but sentenced. In addition, the prosecuting attorney seriously questioned defendant's motives in withdrawing his plea, conveying the impression that defendant was guilty of double dealing with the Court.

But the error is even more strikingly illustrated by what followed. It might be supposed that upon a plea of not guilty a defendant could commence his case *ab initio;* at least he would not be required by the Government to explain why he pleaded guilty and inferentially *why he now pleads not guilty.* For every man has a right to plead not guilty. But in the present case, the fact of defendant's plea of guilty having been proved, and his motives in so pleading and later pleading not guilty having been impugned, it was clearly up to the defendant to "explain." He was forced to do so by the error complained of. Bearing in mind always that the only true issues at his trial were his guilt or innocence, not why he pleaded guilty or why he pleaded not guilty or what sentence he hoped to get, the following facts were brought out all absolutely irrelevant to the issue of guilt or innocence and all highly prejudicial to the defendant's substantial rights, viz.:

1. That defendant, as an inducement to plead guilty, was "offered" three months in jail and a fine of $1,000. (R. 32)

2. That there was a clear understanding to this effect with Mr. Arterberry, Assistant United States Attorney, and Mr. Ross, Post Office Inspector, and that

defendant was to have two months to think it over. (R. 32-33)

3. That defendant, being on bail, went to New York, was returned to Texarkana, pleaded guilty and received a sentence of three years in the penitentiary and a fine of $500.00. (R. 33)

4. That later defendant asked to have his plea, and the judgment and sentence set aside; that the Court, after a hearing, duly set aside the plea, judgment and sentence, and permitted defendant to plead not guilty. (R. 34).

The Prosecuting Attorney in cross-examining the defendant submitted in evidence a certified copy of defendant's Motion to set aside the judgment and sentence. (R. 43) This document sets forth in substance what is referred to above, namely, that accused had an understanding with Prosecuting Attorney Arterberry, Special Prosecutor Shaver, and Post Office Inspector Ross, to the effect that if he pleaded guilty a recommendation of a fine of $1,000.00 and three months in jail would be made. Defendant, after hearing this proposal, conveyed to him by the United States Marshal, interviewed Mr. Arterberry in an endeavor to get him to recommend a fine of $2,500.00 and no imprisonment. Mr. Arterberry stated that he did not believe the court would accept such a recommendation but was positive that if he pleaded guilty the court would accept Mr. Arterberry's recommendation of a fine of $1,000.00 and three months imprisonment. (R. 44-46) The defendant later went to New York, and because of illness was unable to return on February 12th, the date set for his plea. He wired the District Attorney that he was ill with pneumonia. The District Attorney, however, did not wait for him to appear voluntarily but had him arrested in New York. (R. 45)

On his return he saw District Attorney Langley, at which time Mr. Langley stated that he would not himself make any recommendation. Defendant stated that he did not understand this to mean that Mr. Arterberry would not make any recommendation. He stated explicitly that he relied on Mr. Arterberry to make his recommendation and would not have pleaded guilty unless he believed Mr. Arterberry would do as he promised. He was surprised and dumbfounded when upon his plea Mr. Arterberry made no statement but the court immediately sentenced him (R. 46-47).

The prosecution, in cross-examining defendant admitted that at one time at least a promise was really extended to him provided he pleaded guilty. (R. 42) This was also admitted in the Government's response to defendant's Motion to set aside the judgment and sentence (R. 50-52). The Government, however, contended that all such promises were withdrawn by District Attorney Langley. Defendant, however, repeatedly stated that it was not District Attorney Langley that he was relying upon but Mr. Arterberry.

The further cross-examination of defendant by the prosecution found on pages 52 to 57 of the Record was likewise prejudicial, involving a statement by the Prosecuting Attorney to the effect that the Judge on hearing defendants motion had stated that it was "a judicial farce not to put a man in jail when he got away with $21,000.00." (R. 53)

The Government also tried to pin the accused down to the admission that the same facts existed at the time of his trial as existed at the time he pleaded guilty, and that accused had full knowledge of those facts, presumably in an attempt to discredit him with the jury. (R. 54)

ARGUMENT.

Summary.

1. The error is highly prejudicial as held in Heim vs. U. S.
2. The Heim Case is correct on principle.
3. Pleas of guilty are frequently entered by agreement.
4. The action of the Trial Court setting aside the plea is a conclusive determination.
5. The reasons given by the Circuit Court of Appeals are inconclusive.
6. The record shows vividly the error complained of.
7. This Court should not affirm on the theory that the Trial Judge erred in setting aside the plea of guilty.
8. The dissenting opinion in the Heim Case making a distinction between a plea as a plea and a plea as a confession is erroneous.
9. The history of the law of arraignments shows no such distinction.
10. Sec. 860 R. S. is not applicable and hence its repeal is not pertinent.
11. The Carta Case, for the Government, is wrong in principle.
12. Probable reasons for admission of confessions before magistrates.

I.

The Error is Highly Prejudicial and Reversible, as Held in Heim v. U. S.

In the case of Heim v. U. S., 47 App. D. C. 485, the Court of Appeals for the District of Columbia had be-

fore it a prosecution for adultery, wherein, upon arraignment, defendant entered his plea of not guilty. Thereafter, when the case came on for trial, he was without counsel and asked leave of the Court to withdraw his plea of not guilty, and enter a plea of guilty, which was granted. Later defendant moved the Court to allow him to withdraw this plea of guilty and again enter a plea of not guilty. This was granted and he went to trial upon this plea of not guilty. In the course of the trial the Government proved, over objection of defense, the plea of guilty. This was the only assignment of error dealt with in the opinion.

The Court held, reversing, that confessions belong in two general classes, judicial and extra-judicial. It held that a plea of guilty was a judicial confession, and that the objection of defense went to the admissibility of the confession. The Court said:

> "There is but a single question presented,—Is such an admission of guilt ever made under such circumstances as to make it competent evidence upon a trial under a substituted plea of not guilty?
>
> "A plea of guilty to an indictment is made under conditions of duress which require the utmost discretion in receiving it. A defendant should only be permitted to enter such a plea after being admonished by the court as to its consequences. When thus made, he waives the right to trial by jury, and solemnly confesses the truth of the charges made in the indictment.
>
> "* * * The plea of guilty to an indictment amounts to a conviction. It is a conclusive confession of the truth of the charge; hence, the admission of such a plea in the trial under a substituted plea of not guilty, if the confession is to be given the legal inferences which render confessions as matter of law admissible, must logi-

cally be sufficient without corroboration to sustain a verdict of guilty. *Matthews v. State*, 55 Ala. 187, 22 Am. Rep. 698; *State v. German*, 54 Mo. 526, 14 Am. Rep. 481."

The Court stated that its attention had been invited to only three cases in this country where a plea of guilty had been used against a defendant who was later allowed to plea not guilty. It then reviewed the case of *State v. Myers*, 99 Mo. 107, 12 S. W. 516. There the defendant, upon a trial of murder, pleaded guilty in open court. The court refused to accept the plea which was not recorded and set the case for trial. At the trial the prosecution proved the fact that the defendant had previously pleaded guilty. In reversing, the Appellate Court held:

"Such testimony should not have been admitted. The confession being what is termed 'a plenary judicial confession,' that is, a confession made before a tribunal competent to try him, was sufficient whereon to found a conviction. 1 Roscoe, Crim. Ev. 8th ed. 40. Consequently, the trial court might have proceeded at once to pass sentence upon the accused * * * No one would contend that, if the plea of guilty had been entered of record, such plea could have been received in evidence against the defendant, and yet the same principle is involved whether the plea actually goes upon record or not; in either case, it must, if received in evidence, be *conclusive* of the defendant's guilt * * * By refusing to receive the plea and granting the defendant *a trial*, this of necessity meant a trial with the issues of fact to be determined by the jury, and not to be determined by the previous plea of the defendant, which admitted all that the State desired to prove. In short, the trial court could not refuse to re-

> ceive the defendant's plea of guilty at one time, and then use it against him at another."

In the second case referred to by the Court in *Heim v. U. S.*, namely, *People v. Ryan*, 82 Cal. 617, 23 Pac. 121, the court reversed the conviction below upon the ground that the admission in evidence of the plea of guilty was reversible error. The court said:

> "Can it be that a privilege thus conceded to a defendant of *substituting* one plea for another is to have the inevitable effect of defeating the whole object of the 'substituted' plea?"

The third case discussed by the Court in *Heim v. U. S.*, was the case of *State v. Carta*, 90 Conn. 79 L. R. A. 1916E, 634, 96 Atl. 411. This was the only case cited in favor of submitting in evidence a plea of guilty at the trial. Referring to this case, the Court of Appeals of the District of Columbia said:

> "Three judges announced the majority opinion, resting the decision upon the case of *Com. v. Ervine*, 8 Dana. 30, a case of remote analogy, as we shall observe later. Two judges joined in a dissenting opinion, not only conclusive in its reasoning, but in which an overwhelming array of authority is marshaled."

The Court then went on to say that text writers were unanimous in condemnation of the practice, citing Wharton Crim. Evidence, 10th Ed. 638; 2 Encyc. Pleading & Practice 779; 8 Ruling Case Law 112, Abbots Trial Brief 314, and pronounced the *Ervine* case, *supra*, to be only remotely analogous.

Referring to the instruction to the jury in the Heim case, which was somewhat similar to the instruction in the present case, the Court said:

"Nor can the error be cured by an instruction of the court to the jury attempting to place a limitation upon the weight to be given evidence of such a confession. Its admission under any circumstances is such an invasion of the right of one accused of crime to a fair and impartial trial that the error is incurable. It is so destructive of the rights of the accused that the court will not stop to examine into the technical accuracy of the objection made to its admission, but will, in the furtherance of justice, take cognizance of the error and refuse to charge the defendant with any waiver of his rights through the oversight or neglect of his counsel to state with legal precision the grounds of his objection. *Wilson v. United States*, 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197; *Crawford v. United States*, 212 U. S. 183, 194, 53 L. ed. 465, 470; 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392; *Miller v. United States*, 38 App. D. C. 361, 365, 40 L. R. A. (N.S.) 973."

As to the contention that the *Ryan* case should be distinguished for the reason that the withdrawal of the plea of guilty was due to statutory authority, the Court held that, if the plea of guilty was set aside, it mattered not from what source the authority to set it aside was derived. It said:

"The authority for the act, so long as it existed, fixed the status of the defendant. After the plea of guilty was withdrawn, the case was in precisely the same condition as if the plea of not guilty had been originally entered. The admission of guilt had disappeared from the case, because the court, in the exercise of its sound discretion, had determined that, in justice, it should go out of the case. When it was stricken out, its evidential effect as a confession disappeared. To reinstate it in the form of evidence against defendant is to deprive

him of any advantage gained by the withdrawal of the plea of guilty, and restore him to a position where inevitable conviction awaited him at the hands of the jury. As was said in the dissenting opinion in the *Carta Case*, 90 Conn. 79, L. R. A. 1916E 634, 96 Atl. 411: 'Considerations of fairness would seem to forbid a court permitting for cause a plea to be withdrawn for cause, and at the next moment allowing the fact of the plea having been made to be admitted in evidence with all its injurious consequences, as an admission or confession of guilt by the accused. The withdrawal is permitted because the plea was originally improperly entered. No untoward judicial effect should result from the judicial rectification of a judicial wrong.'

"The judgment is reversed, and the cause remanded for a new trial."

This Court refused to disturb this decision when it denied the Government's petition for a writ of certiorari. U. S. v. Heim, 247 U. S. 522, 22 L. ed. 1247 (Memo.).

Of like importance: *Green v. State*, 24 So. 537 (Fla.), wherein the Court said:

"The authorities cited by counsel on this ground sustain the view that when an accused first pleads guilty to a charge, and afterwards, by permission of the court, is allowed to withdraw such plea, and put in the general issue, the plea of confession allowed to be withdrawn cannot be put in evidence on the trial."

State v. Myers, 12 S. W. 516 (Mo.), wherein the Court held:

"Evidence that defendant pleaded guilty at a former term of court, which plea the court re-

fused to receive, is inadmissible, and does not require a special objection"; and

Heath v. State, 214 Pac. 1091 (Okla. 1923), in which the Court decided that:

> "A withdrawn plea of guilty, for which a plea of not guilty is substituted by authority of court, is not admissible in evidence against the defendant."

In this last case the facts are almost identical with those herein. There the defendant had pleaded guilty and had been sentenced. Later counsel moved to be allowed to withdraw the plea and to set aside the judgment. The motion was granted; the judgment was set aside, defendant's plea of guilty was allowed to be withdrawn, and a plea of not guilty substituted. At the trial, the Court, over defendant's objection, permitted the State to introduce in evidence the record showing a plea of guilty and the judgment thereon. After the trial and conviction, the District Attorney filed a confession of error on the ground that the trial court committed prejudicial error in permitting the prosecution to introduce the plea of guilty which had been withdrawn. Reviewing this confession of error, the Court said:

> "Upon a plea of guilty, no trial upon the question of the defendant's guilt can be had. His plea stands in the place of the verdict of a jury finding him guilty, and for this reason we think that a withdrawn plea of guilty, for which, by authority of law and of the court a plea of not guilty is substituted, would not be admissible in evidence against the defendant as a confession nor as an admission against interest. In our opinion, the

rule supported by reason and authority is that a withdrawn plea of guilty, for which a plea of not guilty is substituted by authority of court, is not admissible in evidence against the defendant."

In the case of *People v. Arkins*, 33 Chi. Legal News 192, defendant pleaded guilty to receiving stolen goods and was sentenced. Later he asked the court to vacate the sentence and allow him to plead not guilty. It was proved that he had always protested his innocence and had entered the plea of guilty only on the assurance of the prosecuting witness that the judge would at once discharge him. The court said that the plea of guilty was to be treated as a confession and that being induced by hope of favor it would be set aside. This case was reviewed in 14 Harvard Law Review p. 609 and the writer there states:

"In so far as the opinion is based on the ground that a plea of guilty is to be governed by the rules applicable to confessions of guilt the court seems to have confused matters of evidence with matters of pleading. It is true that a plea of guilty does presumably involve an acknowledgment of guilt, but it is in its nature so different from an ordinary confession that the two cannot be treated on the same basis. A confession is an admission of guilt which is to be used with probative force in determining the issue raised by the plea of not guilty. It is an item of evidence which may be overwhelmed by contrary evidence. But a plea of guilty is final; it does away with a trial and is practically the same as a default in civil proceedings. It is evident that the question of allowing a withdrawal of the plea of guilty cannot with any fairness to the accused be settled within the technical rules concerning the introduction of confession in evidence. This was partially recognized

> in the opinion in the principal case where the promise of favor was made by the prosecuting witness, and not by any officer in authority, so that a confession under the circumstances would have been admissible."

The decisions above cited have been recognized, in effect, in at least two other courts. In *White v. State*, 51 Ga. 285, the Court stated that, if a plea of guilty has been withdrawn by permission and a plea of not guilty substituted, it follows that the plea of guilty simply goes for nothing. In *People v. Cignarale*, 17 N.E. 135 (N. Y. Ct. of Appeals), the court held that the withdrawal of a plea left the case without any plea whatever and that the plea thus withdrawn left no legal consequences of any sort or description.

II.

The Decision in the Heim Case Is Correct on Principle.

It is submitted that upon principle the rulings above referred to are correct. A plea of guilty is a confession of guilt and is equivalent to a conviction. (2 Hale's Pleas of Crown 225, 226; 2 Hawkins Pleas Chap. 31, see *infra*, pp. 32-34)

> "After a plea of guilty there is nothing further for a court to do than to pronounce sentence. A plea of guilty is like the verdict of the jury. There is no duty of the court to 'convict,' but only to sentence." *People v. McEwen*, 2 N. Y. Cr. 307.
>
> "A plea of guilty is not only an admission of guilt, but is a formal confession of guilt before the court in which the defendant is arraigned. It is, in this respect, altogether different from a full and voluntary confession, formally made before a

magistrate or some other person. The latter is merely evidence of guilt. *State v. Branner*, 149 N. C. 559, 562, 63 S.E. 169.

"Where the statute permits the plea of guilty and such a plea is accepted and entered by the court in a criminal case, it is the highest kind of conviction of which the case admits. *Green v. U. S.*, 40 App. D. C. 46, L. R. A. (N. S.) 1117.

A plea of guilty, therefore, stands upon an entirely different plane from any other confession, either judicial or extra judicial. It is not evidence like any other confession, tending merely to prove the charge, but it is a conviction itself. Assume that upon the retrial of a defendant who had been tried and convicted but whose conviction an appellate court had reversed, the Government opened the case by announcing to the jury that the accused had already been convicted in that very case, as the Government opened this case in the lower Court by announcing that the defendant had already pleaded guilty, would one contend such a statement proper? If uttered, how long would an appellate court attempt to weigh or determine the effect of the prejudicial error thus patently committed. A plea of guilty is more than a confession. That aspect of the plea is merged in its other aspect, that of a judicial act dispensing with a trial. In other words, a plea of guilty is just as much a judicial determination of the guilt of an accused as a conviction by a jury. If, therefore, when a conviction is set aside and defendant goes to trial anew, it would obviously be reversible error of the most flagrant type for the Government to prove the previous trial and conviction, upon what reasoning can the course be defended which the Government pursued in this case? Is the error in the latter

less prejudicial than in the former instance? Upon what ground can it be defended?

From another viewpoint, also, a plea of guilty should always be regarded as inadmissible. There is something inherently shocking to our sense of fairness in the prosecution's entering upon the trial of a case, wherein the accused is presumed by law to be not guilty until proved guilty beyond a reasonable doubt, by announcing to the jury that the accused has already acutally pleaded guilty, not to another or similar crime, but to the identical offense for which the jury is about to try him. Far fetched legal analogies as to the *right* of the prosecution to use the plea of guilty thus withdrawn, viewing it merely as a confession, should not outweigh this fundamental common sense consideration. The foundation of our criminal law is that the accused should be entitled to a *fair trial*. This should mean a trial upon the facts uninfluenced by any reference to previous acts of the defendant the effect of which the court has once destroyed. The case should go to the jury upon its merits and the evidence then presented, not upon the judicial act of the defendant in once pleading guilty,—an act the Court determined, by permitting its withdrawal, to have been either a mistake, an error of judgment, or an act in its nature involuntary, resulting from hope or fear.

III.

It is Common Knowledge That Many Pleas of Guilty Are Entered in the Hope That a Lighter Sentence May Be Awarded.

It will be noted that in the *Heim* case, the Court of Appeals gravely questioned whether a plea of guilty,

later withdrawn, is ever made under such circumstances as to make it competent evidence. That Court said that a plea of guilty is made under such conditions of duress as to require the utmost discretion in receiving it. This Court as far back as *Bram v. United States*, 168 U. S. 532, held such duress might consist in either hope or fear. Even without any direct testimony from defendant to that effect, judges and lawyers are all alike aware that many pleas of guilty are entered, not as the spontaneous act of the defendant, but with the distinct hope and expectation that he may be dealt with more leniently. This hope is founded often upon a direct understanding with the prosecution. This is the foundation of that universal rule which allows a defendant, upon pleading guilty, later to withdraw his plea, if he so desires, and to substitute in lieu thereof his plea of not guilty.

> "The court ordinarily will permit the plea of guilty to be withdrawn if it fairly appears that the defendant was in ignorance of his rights and of the consequences of his act or was influenced unduly and improperly either by hope or fear, in the making of it, or if it appears that the plea was entered under some mistake or misapprehension." (16 C. J. 398; 4 Black Com. 329; 1 Chitty Crim. Law 428-429 and cases cited *infra*, pp. 32-36)

It may be remarked that although at the present day the courts do not as a rule officially recognize arrangements between a defendant and the prosecution under which defendant pleads guilty with the understanding that he will receive a certain punishment, such a practice was formerly well known to the courts and recognized by the judges.

Hawkins, in his Pleas of the Crown, states:

"And now I am to consider what is to be done to a prisoner upon his confession; which may be either express or implied."

Sec. 3. "An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it, yielding to the king's mercy and desiring to submit to a small fine, and in which case, if the Court think fit to accept of such submission and make an entry that the defendant *posuit se in gratiam regis*, without putting him to a direct confession or plea (which in such cases seems to be left to discretion) the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where entry is *quod cognovit indictementum*." (2 Hawk. Pleas of the Crown, Chapter 31, Page 466, 8th. Ed. Curwood.)

This was known as far back as the time of Henry 4th. Reference to 11th. Henry 4th—65, 21; 9th Henry 6th-60; Lamb. b. 4 c. 9, Faresly 40; Ab. F. Estopped 24, amply sustains the antiquity of the practice.

In a note to 2 Hales Pleas of the Crown 226, there is the following:

"In trifling personal injuries the prosecutor and defendant frequently settle the charge in private, and the latter comes into court and pleads guilty to the indictment; and upon proof of a general release given by the former submits to a small fine for a breach of the peace which his conduct has occasioned." (1 Burns J. 867)

Chitty, in his Criminal Law, pages 429, 430, 431, fully recognizes implied confessions and gives directions as to the procedure, referring to cases where the prosecutor and the offender agree in private and the latter

submits in court a general release from the former and pays a small fine.

> "Thus also the defendant may, after traversing the indictment, come in and withdraw his plea of not guilty, and confess without entering his traverse, either on an agreement with the prosecutor, or on giving him proper notice of his intention." (1 Chitty, Crim. Law, 430.)

In our own day it frequently happens that the defendant and the prosecution will agree that if defendant will plead guilty the prosecution will recommend a given sentence. Such agreements are frequently carried into execution. There are even cases where upon a sentence being awarded in excess of that agreed upon, the accused has been allowed to plead not guilty.

In *State vs. Kring*, 71 Mo. 551, the Lower Court was reversed and instructed to allow defendant to enter a plea of not guilty where the sentence given was in excess of that agreed upon. To the same effect is *State vs. Stephens*, 71 Mo. 535.

IV.

The action of the court in allowing defendant to change his plea from guilty to not guilty is a conclusive determination that the plea was not voluntary and this determination is binding upon the trial judge.

Where a court allows such a plea to be withdrawn, its action conclusively establishes the fact that the plea was, initially, involuntary or a mistake. Otherwise the Court's action is reduced to an absurdity. Certainly if a court were convinced that the plea was strictly voluntary and entered with a full understand-

ing of its nature if would never allow the accused to withdraw his plea at all. It would not do so through mere caprice. The Court is not compelled by law to allow him to change his plea and numerous authorities may be cited for this proposition. (*Reg. v. Sell*, 9 Car. & P. 346; *Gardner v. People*, 106, Ill. 76; *Sanders v. State*, 85 Ind. 318; *State v. Stephens*, 71 Mo. 535; *State v. Calhoun*, 50 Kans. 523; *People v. Lenne* 67 Cal. 113; *People v. Arkins*, 33 Chi. Legal News 192; *16 C. J. 397*, note 6; page 398, note 12.) If, therefore, a court has granted a defendant's motion to withdraw his plea of guilty, it must have found that the plea was in some sense involuntary, *i. e.*, induced by hope or fear. If it was involuntary, it is inadmissible even as a confession. The latest definition by this Court of a voluntary confession is in the *Wan* case, that "a confession is voluntary in law if, and only if, it was in fact voluntarily made." (*Wan v. United States*, 266 U. S. 1, 14.) When, therefore, the court has permitted a defendant to withdraw his plea of guilty, a conclusive presumption should result that such plea was involuntarily entered, within the meaning of the law. This ought to render the question of its voluntary character and its admissibility against the defendant later *res adjudicata* for the entire case. This is the only logical result which can flow from the action of the Court when it allows it to be withdrawn.

And as to its discretion and right to deny a request to change such a plea, see cases above cited.

The error committed by the trial court and inadvertently affirmed by the Circuit Court of Appeals is clear upon an inspection of this record. Throughout, the plea of guilty has been treated as an ordinary *extra-judicial* confession, and the law and the practice

in determining admissibility of the latter erroneously applied to the admission of the plea. The distinction between the two is plain and of the most vital importance to the defendant, as hereinbefore pointed out. Thus, the trial court instructed the jury that:

> "The plea of guilty is introduced as evidence by the Government. You are to take that into consideration, that is, you will take it into consideration upon a certain condition. If you find that Mr. Kercheval made that plea of guilty and no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If you find out however that he was included, and you are to take all the facts and circumstances into consideration—you are to take Mr. Kercheval's intelligence into consideration in connection with whether or not he could be deceived in a matter of that kind. I say if you find that he was deceived; that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular part of it and consider just the other testimony in the case."

The Circuit Court of Appeals in its opinion sustaining that portion of the charge says:

> "While there was evidence of defendant that some promise had been made him by a Special Assistant District Attorney, Mr. Arterberry, as to punishment in case he pleaded guilty, the evidence of the District Attorney shows that defendant was fully informed by him before the plea that if he

did plead guilty it would be upon his own volition and that no promises whatever would be made to him. It is true in the federal courts, as stated in Ziang Sung Wan v. United States, 266 Fed. 1, 14, that 'the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made.' There is no claim here of any compulsion applied to defendant. The court left it to the jury as to whether the plea of guilty was voluntary or made under some kind of a promise held out to him by which he was deceived. If the latter it was to be entirely disregarded. Certainly this was all defendant could claim under the facts of this record. McBryde vs. United States, 7 Fed. (2d) 466. In the motion made by defendant to set aside the judgment he admits that he had pleaded guilty. The purpose was to reduce the punishment, but if this failed he asked to withdraw his plea, and that the judgment be set aside. We know of no reason why the plea of guilty was not admissible under all these circumstances for what it might be worth. It was not conclusive of guilty and the court so instructed the jury. The defendant probably knew better than anyone else whether or not he was guilty. Under the evidence in this case a plea of guilty upon his part would have seemed a very reasonable thing. We see no substantial or prejudicial error in the admission of any of the evidence complained of."

Thus, both at *nisi prius* and on writ of error, the law which directed the jury in its deliberations and sustained the trial judge in his charge was the law which governs the admissibility of *extra judicial* confessions, not *judicial* confessions in the form of a plea of guilty which in itself is in effect a conviction, not

merely evidence for the consideration of the jury in proving a conviction. This is clearly pointed out in *Heim vs. United States, supra. McBryde vs. United States*, 7th Fed. (2d) 466, relied upon by the Circuit Court of Appeals in its opinion is authority only in reference to *extra judicial* confessions. Two of the four cases quoted as authority by the court in *McBryde vs. United States* originated in the District of Columbia, resulting the one in a reversal in this Court of the United States and the other in merely following the settled law of the District of Columbia and Federal Courts generally in regard to the admissibility of *extra judicial* confessions. That the jury should not always be allowed to consider even an *extra judicial* confession upon instruction as to the law in reference thereto, is established by the reversal of the Court of Appeals of the District of Columbia in the *Wan* case, *supra*. In that case the trial judge thought it proper to follow the settled practice and permit Wan's confession to go to the jury under the law governing its admissibility as given the jury by the court. In that case also there was conflict in the evidence surrounding the making of the confession, a sharp and serious conflict. The presiding justice believed it the duty of the jury to resolve that conflict and to consider or reject the confession according to their determination of the truth of the circumstances under which it was made—a practice hazardous for the accused at best where there is any substantial evidence that the confession was made under circumstances rendering its character involuntary. In reversing, this Court unanimously held that, notwithstanding the conflict in testimony, as matter of law the confession was involuntary and the trial judge should have refused to permit it in evidence

before the jury. Wan has been retried twice since. In neither trial did the prosecution attempt to introduce that confession. The evidence was carefully and strictly limited. The line to which the testimony might approach was marked sharply and nicely. The court was diligent to protect Wan from any reference to his former confession. The jury neither knew nor heard anything of it. It was as if the confession had never been made. In the instant case the court had once concluded the plea of guilty was entered under such circumstances that, upon application for leave to withdraw the same, the plea was withdrawn and another substituted in its place. That determination, allowing the motion to withdraw, concluded just as finally the questions improperly raised at this defendant's trial to his disadvantage as the decision of this Court finally settled all reference to the confession of Wan.

In *Murray vs. United States*, 2nd Fed. 888, 893, 52 App. D. C. 119, the Court of Appeals of the District of Columbia merely announced the familiar principle of law applicable to the admissibility *of extra judicial* confessions whenever their admission in evidence at the trial is attacked upon appeal. Both the *Wan* and the *Murray* cases, therefore, are authority only for confessions made outside the forum of the court and in no way relate to the right of the prosecution to introduce in evidence against the defendant a plea of guilty made in the solemnity of a judicial proceeding, but later withdrawn by leave of the same tribunal after motion made and hearing had thereon. The same court which considered both the *Wan* and the *Murray* cases is the only Federal Court, so far as the diligence of counsel can discover, which has had before it for decision the admissibility in evidence against

the defendant of both *extra judicial confessions* and *a plea of guilty entered but withdrawn by leave of court*. The great weight of State authority is with the opinion in *Heim vs. United States, supra*. Of the distinction between the two the Court of Appeals of the District of Columbia says:

> "We are not here concerned with the rules which govern the admissibility of extra judicial confessions or judicial confessions made before a committing magistrate, which stand upon an entirely different plain from the grade of judicial confessions we are here considering. The plea of guilty to an indictment amounts to a conviction. It is a conclusive confession of the truth of the charge; hence, the admission of such a plea of the trial under a substituted plea of not guilty if the confession is to be given the legal inferences which rendered confessions as matter of law admissible, must logically be sufficient without corroboration, to sustain a verdict of guilty. Matthews v. State, 55 Ala. 187, 28 Am. Reps. 628; State v. German, 54 Mo. 625, 14 Am. Reps. 481."
>
> (*Heim v. United States*, 47 App. D. C. 485, 488, 489.)

Thus, the reasoning of both the trial court in this case and of the Circuit Court of Appeals in its opinion becomes inapplicable. We are no longer concerned with the reasons impelling this defendant's plea in the first instance, his motives or his hopes in making the same. They are not for consideration. They were properly for the determination of the judge who heard and passed on the motion for leave to withdraw. Such questions as whether Mr. Langley informed the defendant no promises would be extended him in the event he pleaded guilty or whether the defendant relied

on Mr. Arterberry's assurance, which were commented upon by the Court below, were for the attention of the judge upon the hearing of the application to withdraw. Once he determined the plea ought to be withdrawn, that ended all inquiry into those matters, and neither another trial judge nor any jury could sit upon his decision by way of review either to correct the same, listen to a reargument of that motion for leave to withdraw or determine the truth of defendant's contention that, when he entered his plea, he did so through hope, fear, or any other influence which rendered it of an involuntary character.

V.

The Reasoning of the Circuit Court of Appeals Herein Is Inconclusive.

The Circuit Court of Appeals in holding the admission of the plea of guilty was no error apparently bases its decision upon two grounds:

1. It could not have been error because it was left to the jury to decide whether the plea was voluntarily entered. (R. 74-75)

2. Because the defendant "knew better than anyone else whether or not he was guilty. Under the evidence in this case a plea of guilty upon his part would have seemed a very reasonable thing." (R. 481)

As to (1) above, it is obvious if this were true, no confession, however inadmissible, would ever constitute reversible error. As to (2), this simply begs the question. In effect the Circuit Court of Appeals says "The plea of guilty was admissible because you *were* guilty." But it is absurd to test the admissibility of a confession by taking for granted what the confes-

sion is intended to prove. This is altogether too simple a solution of the matter and hints at the possibility that the Circuit Court of Appeals never considered the point seriously. Its attention was not drawn to the *Heim* case and other cases in point until a petition for Rehearing was filed, and that Petition was promptly denied.

VI.

The record in the present case shows vividly the evil of the error complained of.

The astounding consequence to the defendant which can flow from attempting to introduce in evidence his formal plea of guilty withdrawn by leave of court is evidenced by what transpired in this case when the attempt to introduce this plea was made. The error committed was particularly flagrant for the reason that the government opened its case to the jury by stating that the defendant had previously pleaded guilty (R. 29). It later submitted in evidence a certified copy of that plea (R. 31). It then attempted to submit the judgment of conviction entered upon the plea thus made. Upon objection as to the competency of the entry of that judgment, the prosecuting attorney, in the presence of the jury, stated that its purpose was:

> "Nothing further than to show that the plea was not attempted to be withdrawn until after judgment and sentence was pronounced. And then, when it was set aside further we can show, and will show, if necessary, that after judgment a motion was filed by defendant not to set aside the plea of guilty. He did not ask for that in the motion, but admitted in the motion that the plea had been entered and asked for the sentence to be reduced. However, we will not offer this at this time." (R. 31)

What situation can possibly be imagined more prejudicial to the interests of a defendant entitled to a fair and impartial trial than this? The prosecuting officer first proves the plea of guilty once entered but later withdrawn and then impugns and attacks the motives of the defendant and his reasons for withdrawing it! Those motives and reasons were properly for the consideration of neither the prosecuting officer nor the jury. The court had passed upon them once. Having found the reasons sufficient and the motives proper, the act of withdrawal was no longer the subject of attack by the prosecution as the act of the defendant. If the subject of comment at all, it could be attacked only as the error of the judge.

With the fact of his plea proved against him and his motives and reasons for withdrawing the same assailed, over his objection and exception, the defendant was then driven in his own case to explain the circumstances surrounding his entering the plea. The record (R. 32-57) is filled with examination and cross-examination of the defendant regarding conversations had, promises extended, assurances made, hopes raised, and then contrary statements in reference to all of these, all to the most serious damage of the defendant and all made necessary by the initial error made by the court in permitting the plea to be introduced at all after the court had once permitted it to be withdrawn. It is difficult to imagine how more prejudicial error could be committed against a defendant.

VII.

Even If This Court Should Believe the Trial Court Erred in Setting Aside the Plea of Guilty, Still It Should Not Affirm.

Counsel for defendant face with frankness this possible contention: That the purpose of defendant's motion which resulted in the plea of guilty being set aside was not to withdraw the plea of guilty but merely to reduce the punishment. From this it may be argued that the Trial Court erred in setting aside the plea of guilty and this court should affirm the decision below on the theory that "no harm was done."

It is submitted that this should not be the decision. Whatever the *purpose* of the motion, the defendant thereby clearly asserted his innocence of the offense charged. Even conceding, for the sake of argument, that the trial judge should not have set aside the plea of guilty, his action cannot legally be reversed by allowing such plea to be used in evidence against defendant. The question before this court is whether a plea of guilty having once been set aside, it still remains, or vestiges of it still remain, in such a way that it can be used against the defendant at the trial, and whether it is proper that it should be so used. It is submitted that once the trial judge set it aside it was set aside in every way and for all purposes. This was the law of the case from that moment on and from the Constitutional prohibition against a governmental appeal in a criminal case after the jury is sworn, it follows that such action of the judge is final and incapable of reversal either directly or otherwise.

VIII.

The Basis of the Dissenting Opinion in the Heim Case i. e. That a Plea of Guilty is Divisible Into (a) The Plea Itself and (b) The Plea as a Confession Makes a Distinction Unknown to the Law and for Which No Authority Can Be Cited.

It is clear from a reading of the dissenting opinion in the *Heim* case that the principal ground of the dissent is the theory that although the plea of guilty may be set aside *as a plea* it still remains as a confession and admissible if it be voluntary. Aside from the fact that this renders the trial Judge's action in setting the plea aside an absurdity, which point has previously been discussed, the entire conception is alien and novel. The nearest analogy would be division of a confession into (a) the confession proper, and (b) the confession as a verbal act. But no one would contend that a confession inadmissible in itself would be admissible as a verbal act. The distinction openly recognizes and exposes the further absurdity of the trial Judge himself deciding that the plea of guilty was involuntary as a plea and yet submitting the same question to the jury viewing the plea as a confession.

IX.

The History of the Law of Arraignments Shows There Can Be No Such Distinction.

As before stated the distinction made in the dissenting opinion in the *Heim* case between a plea as a plea and a plea as a confession, is entirely unknown to the law. An examination of the history of arraignments and pleas shows that no such distinction could be made

for the reason that strictly speaking there was no such thing as a "*plea*" of guilty. If the defendant desired to come in and admit his guilt, he confessed in open court. If not, he filed a plea, i. e., a plea of not guilty.

Thus, Staundford, in his Pleas of the Crown, b 2, c 51, published 1607, states:

> "If one is indicted or appealed of felony and on his arraignment he *confesses* it, this is the best and surest answer that can be in our law for quieting the conscience of the judge and for making it a good and firm condemnation; provided, however, that *the said confession* did not proceed from fear, menace, or duress, which, if it was the case, and the judge had become aware of it, he ought not to receive or record this confession, but cause him to plead not guilty and take an inquest to try the matters." (Italics ours)

Sir Mathew Hale says:

> "Concerning the plea of a prisoner upon his arraignment, the first of his confession of the fact charged:—When the prisoner is arraigned and demanded what he saith to the indictment, *either he confesseth the indictment*, or *pleads* to it, or stands mute and will not answer."
>
> "A confession is either simple, or relative in order to the attainment of some other advantage. That which I call a simple confession is where the defendant upon hearing of his indictment, without any other respect *confesseth it, this is a conviction;* but it is usual for the Court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead." (27 Assiz. 40)
>
> If it be but an extrajudicial confession, though it be in Court, and where the prisoner freely tells

the fact, and demands the opinion of the Court whether it be felony, though upon the fact thus shewn it appeared to be felony, the Court will not regard his confession, but admit him to plead to the felony not guilty. (22 Assiz. 71) (Stamf. P. C. Lib. II, cap. 51, fol. 142 b. (1) 2 Hales Pleas of the Crown, 225-226). (Italics ours.)

Serjeant Hawkins in his Pleas of the Crown, Chapter 31, "Of Confession and Demurrer," states:

"And now I am to consider what is to be done to a prisoner upon his *confession;* which may be either express or implied.

Sect. 1. An express confession is where a person directly confesses the crime with which he is charged, which is the highest conviction that can be, and may be received, after the plea of 'not guilty recorded, notwithstanding the repugnency; for the entry is, that the defendant *postea or relicta verificatione "Cognovit Indictamentum.'"* (S. P. C. 142 Lamb. b. 4, c. 9, Finch 38.)

"And where a person upon his arraignment actually *confesses* himself guilty or unadvisedly discloses the special manner of the fact supposing that it doth not amount to felony, where it doth, yet the judges, upon probable circumstances, that such confession may proceed from fear, menace, or duress, or from weakness, or ignorance may refuse to record such confession, and suffer the party *to plead not guilty."* (S. P. C. 141. 1 Hale 225)

Sect. 3. "An implied confession is where defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it, yielding to the king's mercy and desiring to submit to a small fine, and in which case, if the Court think fit to accept of such submission and make an entry that the defendant *posuit se in pratiam regis,* without putting him to a direct *confession or plea*

(which in such cases seems to be left to discretion) the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where entry is *quod cognovit indictamentum.*"

Sect. 4. "I take it for granted, that no *confession* whatever shall, before final judgment, deprive the defendant of the privilege of taking exceptions in arrest of judgment to faults apparent in the record."

(2 Hawkins Pleas of the Crown 8th Ed. By Curwood, page 466, 467.) (Italics ours.)

Lord Coke in his Institutes referring to arraignment, states:

"But in case of high treason, if the party refuse to answer according to law, or say nothing, he shall have such judgment by attainder, as if he had been convicted by *verdict* or *confession.*

The difference between a man attainted and convicted is, that a man is said convict before he hath judgment; as if a man be *convict by confession, verdict*, or recreancy."

(3 Coke Institutes, Chapt. 14, Thomas's Ed. pages 558, 559.) (Italics ours.)

It will be noticed that Lord Coke refers to conviction by "verdict or confession," *i. e.*, verdict after a plea of not guilty or confession in open court. The same words are used in the statute of 12th George 3, C-30, enacting:

"That if any person being arraigned upon any indictment, or appeal of felony or on any indictment for piracy, shall stand mute, or will not answer directly to the felony or piracy he shall be convicted of the offense, and the court shall thereupon award judgment and execution, as if such person had been convicted by *verdict or confession*, and the judgment shall have the same consequences."

Similarly the Statute of 7 Wm. 3, C-3.

> "No indictment or trial for high treason shall be had except on the testimony of two lawful witnesses."
>
> 'Unless the party arraigned, indicted, or tried shall willingly and without violence in open court *confess* the same he shall stand mute.' (Italics ours.)

Blackstone likewise states:

> "When a criminal is arraigned, he either *stands mute or confesses the fact;* which circumstances we may call incidents to the arraignment; *or else he pleads* to the indictment, which is to be considered as the next stage of proceedings. But, first, let us observe these incidents to the arraignment, of standing mute or *confession.*" * * *
>
> "The other incident to arraignments exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain *confession,* the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment." (4 Black, Com. 324, 329.) (Italics ours.)

Stephen in his Commentaries uses practically the same words:

> "When a person is arraigned, he either stands mute or *confesses* the fact; or else he pleads to the indictment."
>
> * * * * * * * * *
>
> "The other incident to arraignments, exclusive of the plea, is the prisoner's confession to the in-

dictment. Upon a simple and plain confession, the court has nothing to do but to award judgment, but the court in capital cases is usually very averse from receiving and recording such confession, and generally advise the prisoner to retract it and plead to the indictment." (4 Stephen's Com. Chap. 23, 18th Ed. 329, 331.) (Italics ours.)

Similarly, in considering "*Plea and Issue*" he states:

"We must now consider the *plea* of the accused."
(Stephen Com. 18th Ed., page 333.) (Italics ours.)

Chitty, in his criminal law states:

"The last incident of the arraignment is *confession.* * * * and the courts are very reluctant to receive and record such confessions especially where the punishment is capital, and will frequently, out of tenderness to the life of the subject, advise the prisoner to retract it and plead not guilty. And where he freely in court discloses the facts of his case and demands the opinion of the judges whether they amount to felony upon which they reply in the affirmative, they will refuse to record the disclosure and admit him to the full advantage of a trial upon the evidence of the witnesses." (1 Chitty Criminal Law, Capt. 10, pages 428-429.) (Italics ours.)

Pollock and Maitland in their history of the English Law state:

"A man who *confessed* a felony in court or before a coroner was condemned upon his *confession*, and the coroner's record of his confession was indisputable." (2 Pol. & Mait. 653.) (Italics ours.)

It is clear from the authorities above cited that the old English Law made no distinction between a confession and a plea of guilty, rather it may be said that the confession was the plea of guilty. It is obvious from the admonitions against the reception of confessions in open court under circumstances showing ignorance, fear, duress or hope of reward that once a confession was set aside and the defendant allowed to plead not guilty the court would not have permitted the fact of his having made the confession to have gone to the jury. In support of this it may be said that though counsel have diligently searched the books, no single case has been found recorded in England from the earliest times down to the present day in which after a defendant, upon arraignment, had confessed in open court, and the court had admonished him to plead not guilty, the Court still allowed such earlier confession to be introduced in evidence against him.

Hawkins in his pleas of the Crown, Book 2, Chap. 46, Sec. 29 to 43 enumerates different kinds of confessions which are admissible against the defendant. It is significant that neither here nor in Chapter 31 dealing with "Confession and Demurrer" does he make any mention of a case similar to the present. Inasmuch as it is clear from Staundford, Hale, Hawkins, Chitty, and others already cited that in those days it was the practice of judges to receive confessions in open court, similar to a present plea of guilty, with great compunction, it is reasonable to conclude that more pleas of guilty were set aside then than now and that situation similar to the present case arose more frequently in those days than they do at present. The fact that in none of the books may any mention be found of a court setting aside a confession in open

court and allowing a defendant to plead not guilty but still permitting the original confession to be admitted in evidence against the accused is of the highest significance. It shows that no such practice existed.

The whole purport of Staundford, Hale, Hawkins and others above quoted shows how impossible it would have been for a judge in those days to have set aside a confession or plea of guilty in one breath and yet allow it to go to the jury with the next.

X.

Section 860 Revised Statutes Repealed by the Act of May 7, 1910 (Chapter 216—36 Stat. 352) Has No Reference to the Present Case.

In the dissenting opinion in *Heim vs. U. S.* and argument is made to the effect that Congress, by repealing Section 860 R. S., has indicated an intention that a plea of guilty may be used against a party. Section 860 R. S. reads as follows:

> "No pleading of a party, nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; *provided* that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering he testified as aforesaid."

It is apparent from a reading of this section that it was never intended to apply to a criminal plea. "A pleading" is obviously not the same as a plea. The

section was evidently intended to apply to a civil proceeding and was intended to protect the witness against criminal proceedings based upon disclosures obtained from him or pleadings filed by him in a civil case.

A reference to the Legislative history of Section 860 U. S. confirms these statements. This Section was the Act of February 25, 1868 (15 Stat. 37). It was introduced as Senate Bill No. 306 by Senator Trumbull and was referred to the Committee on the Judiciary January 30, 1868. (80 Cong. Globe, Page 833)

Later, the Committee on the Judiciary directed Senator Trumbull to make an oral report to the Senate of the Committee's recommendations. Senator Trumbull gave the following explanation of the Bill:

> "It has been discovered in some suits of the United States where they have sought a disclosure from parties, that they have interposed the plea that making such disclosures in answer—for in effect, to a Bill of discovery—would subject them to forfeitures and penalties, and the courts have recognized that plea as a sufficient defense against making the discovery. To obviate that difficulty and in order that the government may get such information as is necessary, this Bill has been reported on the part of the government and approved by the Judiciary Committee."

Senator Trumbull also stated:

> "It is the law now in some of the States, and we have a similar law in regard to testimony before the Committees of Congress compelling parties to testify—this Bill proposes that he shall not be excused from testifying on the ground that the answer might be used against him in a penal proceeding or in a criminal proceeding."

Similar statements were made by Senators Davis and Henderson, and the Bill was thereupon passed. (60 Cong. Globe, Feb. 4, 1868, pages 950, 951.)

The above explanation of the scope of the bill is further contained by the proceedings leading up to its repeal. It was repealed by the Act of May 7, 1910, which was originally H. R. 16267. The report of the Committee on the Judiciary of the House, referring to Sec. 860, states:

> "This Section was enacted apparently for the purpose of enabling the government to compel the disclosure of incriminating testimony on condition that the witness disclosing the same would be given immunity. In the case of Counselman v. Hitchcock, 142 U. S. 547, it was held that Legislation cannot abridge a constitutional privilege. * * * Since the decision above referred to, Section 860 has possessed no usefulness whatever."
>
> (House Report No. 206, 61 Cong. 2nd Session.)

The Senate report of the Committee on the Judiciary on the same Bill adopts the report of the Judiciary Committee of the House above quoted. Going further, it shows that the Legislation in no way referred to a criminal plea. (Senate Report No. 502, 61 Cong. 2nd Session.)

The debates in the House and the Senate on a Bill to repeal Section 860 R. S. likewise show that the object of the Legislation is not in any way to effect a criminal plea of guilty or not guilty. (See Vol. 45, Part 3, Cong. Rec., 61st Cong., 2nd Session.)

(House Debate, pages 2251-2252; Senate Debate, 3564-3565.)

The report of the Attorney General for the year

1908, pages 22 and 23, shows that the government's view of the Bill was the same as that of Congress.

No case has been discovered where Sec. 860 has been applied to a criminal plea.

XI.

The Decision in the Carta Case is Wrong in Principle.

The *Carta* case, 96 Atl. 411 (Conn.) has been referred to by the government as the leading case in its favor on the question here involved. The facts were substantially similar to those in the present case with this exception: That the State offered the proof that defendant had pleaded guilty not as a confession but as showing conduct inconsistent with innocence. In the present case there was no such qualification. Proof of the plea was made for all the damage it could do. In sustaining this action, the majority opinion in the *Carta* case argues that it must be presumed the plea of guilty was voluntary and was in fact voluntary as a confession. The court states that there was no "misunderstanding" between the defendant and prosecution leading to the entering of the plea. The action of the trial court in setting the plea aside is, therefore, a grand anomaly. The Appellate Court does not attempt to explain it, but excuses it with these words:

> "We suppose that the Universal practice in this State has been for the court to exercise that discretion in favor of the accused to permit him to change his plea and leave it to the jury to decide the question of his guilt."

In other words it was simply an act of grace or indulgence on the part of the trial Court.

This view makes the action of the trial court an absurdity if the facts show that the defendant knows what he is doing when he pleads guilty and by so doing confesses, under circumstances of the utmost solemnity and finality, his guilt, and if there was no inducement, by way of understanding with the prosecution or in any other way. It certainly cannot be supposed that the court would allow him to change his plea merely because he wanted to. This would reduce judicial proceedings to a game in which the actions of the judge would be dictated not by common sense and judicial acumen but by a sort of sentimental sportsmanship.

The Court then argues that inasmuch as a plea of guilty before a Justice of the Peace or a Committing Magistrate can be proved upon the trial, that this is authority for allowing a plea of guilty submitted at the trial itself but later withdrawn, to be likewise used. But the two cases are utterly dissimilar. In the first place there is no such thing as a "plea of guilty" before a Committing Magistrate. The defendant does not plead. He is not compelled to say anything and if he does make a statement it is simply an admission or confession, in its nature voluntary. In the second place it overlooks entirely the fact that the plea of guilty made in court *has been set aside*. Suppose the so called "plea of guilty" on confession before the Committing Magistrate has been set aside or held for naught, would anyone then argue that it would later be admissible at the trial in the upper court?

The Court continues:

> "The withdrawal of the plea withdraws the evidence of conviction, but it does not withdraw the fact that such a plea was entered. It is as competent to give evidence of that fact as to give evidence that a similar fact occurred in the Justice's or Magistrate's Court."

This does away with all rules of evidence relating to relevancy and competency. The mere fact that a given thing happened is no reason for allowing it in evidence. It must first be proved relevant, competent and material. A confession procured by duress or inducement would not be admissible simply because it was "a fact."

XII.

Probable Reasons Why Confession Before Committing Magistrate Regarded as Admissible.

It is not the purpose of this brief to enter into a discussion of the complicated question of why a confession made in a preliminary hearing before a Committing Magistrate is admissible in the trial court. The English law is not entirely consistent on this subject, and as pointed out by Wigmore (1 Wigmore, Ev. Sec. 817) there have been various stages in the history of the law of confessions from the time when duress was common and torture sometimes inflicted to the present when ample safeguards are placed about the prisoner. A confession before a Magistrate is like other extra-judicial confessions and the ordinary rules apply. It is probable that the reason they were early held admissible was because such examination was pursuant to Statute and the law considered that the defendant's rights would be amply safeguarded in the hands of its own appointed Judges. Thus under the Statutes of 1 and 2 Phillip & Mary C. 13, and 2 and 3 Phillip & Mary, C. 10, Justices of the Peace and Coroners had power to take examinations of the party accused and to put them in writing. Sir Matthew Hale states that such examinations are admissible in evidence upon the following conditions:

"1. Oath must be taken either by the Judge, the Coroner that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination.

2. As to the examination of the prisoner it must be testified that he did it freely without any menace or undue terror imposed upon him; for I have often known the prisoner to disown his confession upon his examination, and hath sometimes been acquitted against such his confession; *and the reason why these examinations and informations are admissible in evidence (under the occasions above premised) is because they are Judges of record and the informations on them upon oath are authorized and required by Act of Parliament*, and they are judges of the crimes upon which the informations are taken." (Italics ours.)

(2 Hales Pleas of the Crown, Chap. 38, pages 284, 285.)

And later he states:

"If a Justice of Peace takes information in a case of high treason, it seems these cannot be read in evidence upon an indictment of treason, *because high treason is not within that commission.*" (Italics ours.)

(Hale's Pleas, pages 285-286.)

To the same effect is 2 Hawkins' Pleas of the Crown, Chapter 46, Section 29; Chitty Crim. Law, pages 570-571. The two statutues of Phillip & Mary above referred to were repealed by the Statute of 7 Geo. 4, Chap. 64, which required the Justice of the Peace before committing any person for felony "to take the examination of such person and such Justices shall subscribe of such examination, information, bailment, and recognizances and deliver the same to the proper

officer of the court in which the trial is to be before or at the opening of the court."

A further reason why such confessions were admissible is the fact that defendant is not compelled to make a statement before the Committing Magistrate and hence anything said by him may be regarded as free and voluntary. The law was settled early that a confession *under oath* before a Committing Magistrate was inadmissible. (2 Hawkins Pleas of the Crown, Chapter 46, Section 35; 1 Starkie 242; 1 Chitty Criminal Law 573; 1 Hale P. C. 585; 2 Hale 52, 120, 284; Bac. Ab. Evidence; L. Burn, J. Examination. Dick, J. Examination 3.)

Chitty states:

> "The examination of the prisoner ought not to be upon oath and when thus taken it has been rejected. On first view it might appear unreasonable to refuse in evidence a confession made under this sanction, requiring the stricter adherence to truth, and which would otherwise have been evidently admissible; but it must be remembered, that every admission of the prisoner must, in order to render it available, be purely voluntary; and that the dread of perjury, with the apprehension of additional penalties in case he deviates from the truth, may create an influence over his mind, which the law is particularly scrupulous in avoiding."
>
> (1 Chitty, Crim. Law 86.)

While modern legal thought would probably not assent to the last quoted statement we are not concerned here with its logic, good or bad, but simply with the reasons why such examinations before Committing Magistrates were considered admissible. The fact that such statements by the defendant were made in

accordance with statute; that defendant was not compelled to make any statement and that if he was compelled, by putting him under oath, his statement was inadmissible, seems a sufficient explanation of the fact. But it is evident that these reasons do not apply where the alleged confession is in the form of a plea of guilty, which plea has been set aside.

For full discussion of the history of the admissibility of confessions see 1 Wigmore Evidence, Section 817.

Conclusion.

In view of the foregoing it is respectfully submitted that the judgment below should be reversed and the cause remanded with instructions to grant a new trial.

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